

ORIGINAL

DOCKET FILE COPY ORIGINAL
Before The
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

APR 21 1997

*Federal Communications Commission
Office of Secretary*

In The Matter Of)

Amendment of the Commission's Rules)
Regarding Multiple Address Systems)

WT Docket No. 97-81,
)

To The Commission:

**COMMENTS OF JMP TELECOM SYSTEMS, INC. TO
THE COMMISSION'S NOTICE OF PROPOSED RULEMAKING**

J. Jeffrey Craven
Julie A. Barrie
PATTON BOGGS, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037-1350
202-457-6000

Its Attorneys

April 21, 1997

No. of Copies rec'd
List ABCDE

024

TABLE OF CONTENTS

INTRODUCTION	1
I. The Commission Should Process the 932/941 MHz MAS Bands By Lottery, Not by Auction.	1
II. If the Commission Decides to Auction the 932/941 MHz MAS Bands, Despite the Cost and Time to Applicants, the Public and the Commission, the Commission Should Neither Dismiss the Applications Already Filed nor Allow New Applications in the Auction.	3
CONCLUSION	3

INTRODUCTION

On January 2, 1992, JMP Telecom Systems, Inc. ("JMP") applied for a Multiple Address System ("MAS") license on the 932/941 MHz band. No determination has yet been made for applications in the 932/941 MHz bands. On February 27, 1997, the Commission issued a Notice of Proposed Rule Making (the "NPRM") regarding MAS, through which the Commission sought comments regarding the use of competitive bidding for the 932/941 MHz bands, and proposed to dismiss the pending applications for those bands.^{1/} In the meantime, the Commission ordered that all of these applications be held in abeyance.^{2/}

I. The Commission Should Process the 932/941 MHz MAS Bands By Lottery, Not by Auction.

The Commission should not proceed as is contemplated in the NPRM, by submitting applications to competitive bidding. The Commission should proceed as originally planned with the lottery method. Under the "Special Rule" of Section 6002(e) of the Omnibus Reconciliation Act of 1993,^{3/} the Commission has discretion to award the licenses by random selection procedures. In a similar decision that arose in the context of unserved cellular licenses, the Commission determined that it would conduct a lottery rather than an auction.^{4/} Under the same rationale articulated in that decision, the Commission should award MAS licenses through lotteries.

^{1/} NPRM at 26.

^{2/} NPRM at 35.

^{3/} See 47 U.S.C. §309(i),(j).

^{4/} Memorandum Opinion and Order, In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Released July 14, 1994.

In the cellular context, the Commission decided that "the Congressional intent and the public interest would best be served by using the statutory lottery procedures for the unserved area applications filed prior to July 26, 1993."^{5/} The Commission agreed with cellular commenters, who argued that since many of the applicants had been on file for more than a year, and many of the business plans did not take into account the additional expenditures that would be incurred if licenses were awarded by competitive bidding, it would be unfair for the Commission to start the entire process anew by submitting the applications for auction.^{6/}

JMP believes that the same analysis applies to the MAS bands and that the same type of additional costs would accrue to MAS applicants. Five years have already passed since JMP and other MAS applicants applied for 932/941 MHz band licenses. For cellular licensees, the Commission found it significant when applicants waited for one year.^{7/} Further, all of these applicants have already spent money and time, and have waited patiently for the Commission to license this new service. For the Commission to now contemplate holding an auction instead of the originally-planned lottery is inequitable and inconsistent with the Commission's treatment of the similarly situated cellular unserved area applicants.

The Commission is required to treat similarly situated applicants alike, or to provide an adequate explanation for disparate treatment. Adams Telcom, Inc. v. FCC, 38 F.3d 576, 581 (D.C. Cir. 1994) (citing McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1365 (D.C. Cir. 1993)). See also Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965). Thus, MAS

^{5/} Id. at 7390.

^{6/} Id. at 7391.

^{7/} "[T]he commenters point out that many of these cellular unserved area applications have been on file for more than a year. . . These arguments are, we believe, valid ones." Id.

applicants should be able to expect the treatment received by the cellular applicants discussed above.

An auction would increase the cost to applicants already in the system and slow down the process for everyone. The Commission determined in the context of unserved cellular applications that "it has been estimated that it may take 60 days or longer to complete an auction than to complete a lottery. . . In contrast, if we employ lotteries, we will be able to proceed almost immediately to issue authorizations for these services."^{8/} Continuing with the lottery for the MASs would be the most efficient course of action for the applicants, for the Commission, and for the public.

II. If the Commission Decides to Auction the 932/941 MHz MAS Bands, Despite the Cost and Time to Applicants, the Public and the Commission, the Commission Should Neither Dismiss the Applications Already Filed nor Allow New Applications in the Auction.

The Commission contemplated in the NPRM dismissing all of the current applicants for the 932/941 MHz bands. JMP strongly opposes such a plan. JMP and the other applicants filed for these MAS licenses five years ago, and have been waiting for the Commission to act. Now the Commission proposes that instead of moving forward, the process should backtrack and the Commission should begin the entire process from scratch. Clearly such a step would have an enormous cost to the applicants who are already waiting -- in full compliance with Commission Rules -- for a decision.

JMP is at a loss as to the rational reason for such a step. The applicants already on file complied with Commission Rules years ago. Even if the Commission decides to reverse course

^{8/} *Id.* at 7392.

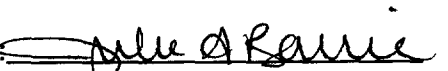
and auction the band rather than submit it to lottery, these applicants should be the only ones eligible. It would slow the process even further to begin from the application process again, and would be a disservice to the public and to the Commission. The only potential beneficiaries of such a plan are companies who were not in the original application pool and who would now wish to be. It seems ludicrous to encumber the public cost and time, the Commission cost and time, and to devastate the existing applicants merely to serve these companies' interests.

CONCLUSION

The Commission should proceed as originally planned, and hold a lottery for the 932/941 MHz bands. To do so would create the most expeditious allotment of the bands, and allow their use to the public to begin as soon as possible. The Commission should not dismiss the applications that were submitted according to Commission Rules and that have been waiting for action for five years. The Commission should remove all of these applications from abeyance, and act upon them, by lottery, as quickly as possible.

Respectfully submitted,

JMP TELECOM SYSTEMS, INC.

By: 

J. Jeffrey Craven

Julie A. Barrie

PATTON BOGGS, L.L.P.

2550 M Street, N.W.

Washington, D.C. 20037-1350

202-457-6000

Its Attorneys

April 21, 1997